Vital Facts Does Substantial Justice between the Parties.—Where the record satisfies the appellate court that the vital questions of fact were fairly submitted to the jury, and that the parties had a fair trial upon the merits, the law has done the best it can in attaining substantial justice between the parties, and the judgment rendered on the verdict will be affirmed, under Code 1919, § 6331.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 623.]

Error to Hustings Court of Richmond.

Action by J. D. Wellons against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. M. McGuire and *T. Justin Moore,* both of Richmond, for plaintiff in error.

David A. Harrison, Jr., of Hopewell, and *Byrd & Gwathmey* and *Fulton & Wicker,* all of Richmond, for defendant in error.

MONROE & MONROE, Inc. *v.* COWNE.

June 15, 1922.

[112 S. E. 848.]

1. Evidence (§ 242 (1)*)—Admission of Evidence of Declarations of Agent of Seller of Machine about Efficiency of an Assistant in Installing Machinery Held Not Error.—In an action by a buyer of a milking machine against the seller for breach of warranty, admission in evidence of the declarations of the agent of the seller who was installing the machine concerning the efficiency of an assistant whom the buyer employed and whose efficiency was put in issue was not error, as it was within the scope of his employment.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 282.]

2. Evidence (§ 129 (6)*)—In Action for Breach of Warranty, Evidence that a Purchaser of Machine Like Plaintiff's Also Had Trouble with It Admissible.—In an action by the buyer of a milking machine against the seller for breach of warranty, evidence by the purchaser of another milking machine like plaintiff's as to its efficiency after a trial under circumstances narrated by the witness, and which tended to show that the machine was properly managed and attempted to be used as intended, was proper; its weight being for the jury.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

3. Evidence (§ 117*)—Evidence by Witness Who Did Not See Milking Machine Used as to Injured Condition of Udders of Plaintiff's Cows in Action for Breach of Warranty Admissible.—In an action by the buyer of a milking machine against the seller for breach

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

of warranty, the admission of evidence by one who had not seen the machine used on plaintiff's cows as to the condition of the udders of the cows, in view of other testimony tending to show that the machine was actually used on the cows in question, was not error.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

4. Evidence (§ 129 (6)*)—Evidence that Seller Took Back a Milking Machine Similar to Plaintiff's on Payment of Money Admissible in Action for Breach of Warranty.—In an action by a buyer of a milking machine against the seller for breach of warranty, admission of evidence by a purchaser of a machine exactly like the one in question that defendant took it back because it was inefficient upon the witness' paying money to cover the expense of installation was correct, since it tended to show the inefficiency of the machine bought by plaintiff, which was a duplicate of the machine owned by the witness.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

5. Appeal and Error (§ 1033 (3)*)—Admission of Evidence Favorable to Defendant as to What Its Agent Told a Purchaser of Defendant's Machine Held Harmless to Defendant.—In an action by the buyer of a milking machine against the seller for breach of warranty, admission of testimony by a purchaser of a machine like the one in question that the witness had had trouble with his machine, and that on writing to the seller an agent was sent who operated the machine and told the witness to go ahead, was not error, although there was no testimony to identify the agent as an agent of the seller, since the testimony as to what the agent did and said was favorable to the seller.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

6. Evidence (§ 131*)—In Action for Breach of Warranty, Exclusion of Evidence that a Different Machine Bought from Defendant Worked Properly Held Not Error.—In an action by the buyer of a milking machine against the seller for breach of warranty, evidence by one who had bought a machine of the seller that it worked properly, but that it was made under a different patent, and had a different pulsator from that of the machine bought by the plaintiff, was properly excluded.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

7. Evidence (§ 314 (2)*)—Exclusion of a Statement by an Expert Not a Witness as to Hearsay Held Not Error.—In an action by the buyer of a milking machine against the seller for breach of warranty, exclusion of evidence of substance of a report of an expert, who was not a witness, sent by the seller to help operate the machine, not made in the presence of the buyer and not communicated to the buyer by letter or otherwise prior to the trial, was proper; the testimony being hearsay.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

8. Evidence (§ 471 (29)*)—Exclusion of Testimony as to Whether Efforts of Milking Machine Company to Eradicate Mammetis Was Voluntary Held Proper.—In an action by the buyer of a milking machine against the seller for breach of warranty, in which plaintiff claimed that the machine injured the udders of his cows, contrary to a warranty that the machine would do good work, exclusion of testimony of an official of the seller's as to whether efforts in aiding farmers who purchased the machines in eradicating the disease of mammetis from their herds was a voluntary service or one performed under obligation was proper, since the question called for an expression of opinion from the witness as to what the warranty of the machine meant.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

9. Sales (§ 285 (4)*)—Requirement of Notice May Be Waived.—The requirement in a warranty of machinery sold that the buyer notify the seller of its failure to work properly must be strictly complied with, not only as respects the place, but also the time and manner of notice; but such requirement may be waived by the seller's conduct.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 657.]

10. Principal and Agent (§ 177 (4)*)—Notice of Defect of Article Given to Seller's Agent Held Constructive Notice to Seller—Where a contract of sale of a milking machine provided that notice by the buyer should be given at a certain place if the machine did not work properly, and the machine did not work properly when first installed by seller's agent, a notice to the agent was constructive notice to the seller.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 275.]

11. Sales (§ 285 (4)*)—Requirement as to Notice of Defects May Be Waived by Seller's Persistent Efforts to Remedy Defects.—The requirement in a warranty of machinery sold that the buyer notify the seller of its failure to work properly is waived by the seller's conduct, consisting of persistent efforts to remedy defects in the machine sold, so that whether any notice at all is given is immaterial, as notice would be useless.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 657.]

12. Sales (§ 285 (2)*)—Warranty Requirement that Notice of Defects Be Given "Immediately" or "At Once" Means Notice within Reasonable Time.—In a contract of sale of warranted article, requiring the buyer, if the article failed to work properly, to notify the seller "immediately," and providing that failure to give notice "at once" should be conclusive evidence of fulfillment of the warranty, the terms "at once" and "immediately" meant as soon as, under the circumstances, notice could be given; that is, such reasonable time as should be required under all the circumstances for the particular case.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, At Once; Immediately. For other cases, see 13 Va.-W. Va. Enc. Dig. 657.]

13. Evidence (§ 131*)—In Action for Breach of Warranty of Milking Machine, Evidence of Manner in Which Machines Like One in Controversy Worked Held Proper.—In an action by the buyer of a milking machine against the seller for breach of warranty, an instruction that evidence of the manner in which milking machines of like kind as that sold plaintiff performed their work was admissible, and to disregard such evidence as to machines not of like kind was correct.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 663.]

14. Trial (§ 267 (3)*)—Amending Instruction that a Purchaser Lost Right to Rescind by Failure to Give Notice of Defects, by Adding, "unless Such Notice Was Waived," Proper.—In an action by the buyer of a milking machine against the seller for breach of warranty in which the contract of sale required notice to the seller of failure of the machine to work properly, and provided that continued possession of the machine by the buyer or failure to give notice at once should be conclusive evidence that it fulfilled the warranty, an instruction that if the buyer, after discovery of defects, retained possession of the machine and failed to give notice to the seller, he waived his right to rescind the contract was properly amended by adding the condition, "unless such notice was waived by" the seller "as provided in these instructions," since the amendment was merely consequential and harmonized the instruction with others.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

15. Trial (§ 267 (3)*)—Instructing Recovery on Warranty Barred by Failure to Give Notice of Defects Amended by Adding "unless Notice Waived.—In an action by the buyer of a milking machine against the seller for breach of warranty, where the contract of sale provided that notice of defects in the machine were to be immediately given to the seller, and that retaining the machine would be conclusive evidence that it fulfilled the warranty, an instruction that, even if the machinery did not comply with the warranty and was incapable of being made to do so, if the buyer failed to give notice or continued in possession of the machine, either of those facts constituted conclusive evidence of the fulfillment of the warranty, was properly qualified by the clause, "unless the jury believe that these requirements were waived by the defendant," since the amendment was consequential and harmonized the instruction with previous instructions.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

16. Appeal and Error (§ 1068 (5)*)—Failure to Instruct as to Consequential Damages Harmless, Where None Given.—In an action by the buyer of a milking machine against the seller for breach of war-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ranty, striking out a subsection of one of the seller's instructions to the effect that the seller was not liable under the warranty, even if it was breached for any consequential damages that resulted to plaintiff's cows, was not error, in view of the fact that the verdict did not include such consequential damages.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

17. Sales (§ 446 (8)*)—Amending Instructions So as to Render Seller of Warranted Machine Liable if Buyer Requested Seller to Take It Back Held Correct.—In an action by the buyer of a milking machine against the seller for breach of warranty where there was evidence that the buyer desired to return the machine, and that the seller, although fully informed of such desire, refused to accept such return, an instruction that the burden was on the buyer to prove that he returned the machine to the seller and demanded repayment of the purchase money was properly amended by the clause "or requested the defendant to take back" the machine.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

18. Sales (§ 429*)—If Buyer Accepts Warranted Goods and Retains Them, No Recovery Can Be Had for Breach of Warranty, unless They Are Worthless for Any Purpose.—Where a warranty of goods contains a condition that they shall be deemed to fulfill the warranty unless returned, generally if the buyer retains the goods, no recovery can be had for breach of the warranty, even in an action for damages, unless the goods are worthless for any purpose.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 657.]

19. Sales (§ 287 (6)—Refusal of Offer to Return Goods Is Equivalent to Return.—An offer to return warranted goods, which offer the seller refuses to accept, is equivalent to a return of the goods, and fulfills the warranty condition as to return.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 657.]

20. Trial (§ 267 (3)*)—Instructions as to Liability and Duty of Buyer When Machine Bought Proves Defective Held Proper.—In an action by the buyer of a milking machine against the seller for breach of warranty, in which the contract of sale required notice to the seller of failure of the machine to work properly, an instruction for defendant that it was the duty of the buyer to give the machine such trial as the contract contemplated and to give notice if it failed to fulfill the warranty was properly amended by the clauses, "or could not be made to do good work" and "offer to return the machinery as the contract provides," and that if the buyer kept the machine and used it and neglected to give such notice he was not entitled to damages, was properly amended by the clause that, "unless the jury believe that such notice was waived by the defendant, or that such continued use was induced by defendant and intended by it as a waiver of that provision in the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

warranty made for his benefit"; such amendments being proper to make the instruction applicable to the evidence and to prevent a conflict between the instruction and those given for plaintiff.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

21. Trial (§ 267 (3)*)—Amendment of Instruction as to Notice of Seller of Defects Held Proper to Prevent Conflict between Instructions.—In an action by the buyer of a milking machine against the seller for breach of warranty in which the contract of sale required notice to be given the seller on failure of the machine to work properly, an instruction that notice to a mechanic sent by the seller to install the machinery was not sufficient notice to the seller, unless plaintiff showed that the notice was communicated to the seller, was properly amended by the clause "or acted upon by it"; the amendment being proper to make the instruction applicable to the evidence and necessary to prevent a conflict between the instruction and those given for the buyer.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

22. Sales (§ 446 (7)*)—Amendment of Instruction Held Not Error.—In an action by the buyer of a milking machine against the seller for breach of warranty, the amendment of an instruction that, if the machine sold to the plaintiff was capable of doing good work with proper management, to find for the defendant, by inserting the words "as installed" after the words "to the plaintiff," was not erroneous as making the instruction misleading.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 664.]

Error to Circuit Court, Fauquier County.

Action by W. S. Cowne against Monroe & Monroe, Inc. From judgment for plaintiff and overruling a motion to set aside the verdict in plaintiff's favor and grant a new trial, defendant brings error. Affirmed.

The other pertinent matters are stated in the opinion of the court.

Hyden & Robinson, John S. Barbour, of Fairfax, and *James R. Caton,* of Alexandria, for plaintiff in error.

Wm. Horgan, of Warrenton, for defendant in error.

CHANDLER *v.* CHANDLER.

June 15, 1922.

[112 S. E. 856.]

1. Divorce(§ 62 (1)*)—Facts Concerning Domicile Jurisdictional.—Jurisdiction to grant divorce being especially statutory and limited under Code 1919, § 5105, all the facts concerning the domicile of the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.